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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JEFFER, MANGEL, BUTLER &
MARMARO,

Plaintiff and Appellant,

v.

SOUTHLAND LAND CORPORATION,

Defendant and Respondent.

B214255

(Los Angeles County
Super. Ct. No. KS009236)

APPEAL from an order of the Superior Court of Los Angeles County. R. Bruce Minto, Judge. Affirmed.

Jeffer, Mangels, Butler & Marmaro, John A. Graham and Neil C. Erickson for Appellant Jeffer, Mangels, Butler & Marmaro.

Cynthia Woollacott for Respondent David Haberbush.

Jeffer, Mangels, Butler & Marmaro appeals an order awarding it attorneys' fees in connection with its representation of David R. Haberbush, the court-appointed receiver for Southland Land Corporation. The trial court reduced Jeffer's requested fees primarily because the Receiver had failed to comply with a court order requiring it to make monthly accountings in the receivership. Jeffers contends the trial court abused its discretion because its fee reduction improperly penalized Jeffers for conduct of the Receiver. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 6, 2004, the trial court appointed David R. Haberbush receiver for Southland Land Corporation, a large real estate development firm with substantial real estate assets, to oversee its liquidation pursuant to Corporations Code sections 1800 and 1803.¹ At the time, Southland had 53 lawsuits pending against it and was enmeshed in the political corruption scandals surrounding the City of South Gate. Southland was a parent of numerous subsidiary entities invested in real estate.

1. The Order Appointing the Receiver and Order Approving His Retention of Jeffer.

The order appointing Haberbush as Receiver required him to "prepare and serve monthly statements reflecting the Receiver's fees and administrative expenses, including fees and costs of any accountants and attorneys authorized to be employed by the court, incurred for each monthly period in the operation and administration of the Receiver

¹ California Corporations Code section 1803 provides, "If, at the time of the filing of a complaint for involuntary dissolution or at any time thereafter, the court has reasonable grounds to believe that unless a receiver of the corporation is appointed the interests of the corporation and its shareholders will suffer pending the hearing and determination of the complaint, upon the application of the plaintiff, and after a hearing upon such notice to the corporation as the court may direct and upon the giving of security pursuant to Sections 566 and 567 of the Code of Civil Procedure, the court may appoint a receiver to take over and manage the business and affairs of the corporation and to preserve its property pending the hearing and determination of the complaint for dissolution."

estate. Upon service of such statement, the Receiver may disburse from the estate funds, if any, the amount of such statement. Notwithstanding periodic payment of fees and expenses, all fees and costs shall be submitted to the Court for its approval and confirmation in the form of either a properly noticed interim request for fees, by stipulation of all parties, or by a Receiver's final account and report."

Pursuant to the appointment order, the Receiver employed Jeffer, a firm with a practice group specializing in receiverships, to represent him. On October 14, 2004, the trial court granted the Receiver's ex parte motion for an order authorizing Jeffer's employment at its customary hourly rates. The order appointing Jeffer stated that "Receiver has requested that [Jeffer] render its billings to Receiver on a monthly basis. Receiver proposes to pay such billings on a monthly basis, subject in all cases to the submission of fee applications and to confirmation by this Court upon submittal to this Court of fee applications from time to time by [Jeffer]. [Jeffer] has agreed that this court's orders in connection with its fee applications will bind [Jeffer] with respect to its compensation and reimbursement of costs. In this manner, Receiver believes that this Court will have and maintain full and complete authority and discretion over legal fees incurred by Receiver and the Receivership estate and the payment thereof." The order described Jeffer's fees as ranging up to a maximum of \$595 per hour.

The receivership operated from October 6, 2004 until April 23, 2008, when Southland filed for Chapter 11 reorganization. The parties do not dispute that during that time, the Receiver did not make monthly reports pursuant to California Rules of Court, Rule 3.1182,² nor did he make an application to pay interim fees to Jeffer.

² California Rules of Court, rule 3.1182 provides: "The receiver must provide monthly reports to the parties and, if requested, to nonparty client lien holders. These reports must include: [¶] (1) A narrative report of events; [¶] (2) A financial report; and [¶] (3) A statement of all fees paid to the receiver, employees, and professionals showing: [¶] (A) Itemized services; [¶] (B) A breakdown of the services by 1/10 hour increments; [¶] (C) If the fees are hourly, the hourly fees; and [¶] (D) If the fees are on another basis, that basis. [¶] (b). . . The monthly reports are not to be filed with the court unless the court so orders." The order appointing Haberbush did not require the reports to be filed.

During the receivership, Haberbush liquidated Southland's property holdings valued at more than \$8.1 million, and eliminated approximately \$45.7 million of secured and unsecured claims, including the \$25 million fraud claim of the City of South Gate against Southland.

2. *The Receivership Plans and the Court's January 24, 2008 Order; Southland's April 23, 2008 Chapter 11 Proceedings.*

In April 2007, the Receiver filed a Receivership Plan, which provided for the distribution of the estate's assets and the classification and allowance of claims. In May 2007, the trial court refused to approve the Receivership Plan because of defects in the claims procedure and concerns the estate would remain open for years, and expressed its view that the interests of creditors would be better served by bankruptcy proceedings. The Receiver filed a revised Receivership Plan to address these concerns, but creditor Rothenberg Sawasy Architects, Inc. (RSA) objected.

On January 24, 2008, the trial court denied the motion to approve the revised plan, again pointing out that Southland's creditors would be better off if Southland were in a chapter 11 proceeding. After the April 2008 commencement of Southland's chapter 11 proceedings, the Receiver turned over all assets to the bankruptcy estate, and requested that the trial court terminate the receivership proceedings.

3. *Jeffer's Fee Application and the Receiver's Final Report.*

The Receiver's Final Account, filed May 30, 2008, showed an ending balance of \$744,746.88, which the Receiver had transferred to Southland's chapter 11 estate. The Receiver's Final Report stated that the Receiver had paid himself \$1,263,392.04 in fees and \$8,262.71 in costs; his fees and costs post-chapter 11 totaled \$12,946.64.

On May 30, 2008, Jeffer filed its request for attorneys' fees covering the entire period of the receivership (September 2004 through April 23, 2008), although it had already received interim payments from the Receiver of \$1,524,765.56, without court approval, for the period August 2004 through April 19, 2008. Jeffer also sought fees incurred subsequent to the filing of Southland's bankruptcy in the amount of \$23,105.

Jeffer's application did not contain a narrative of the services provided to the Receiver, and attached printouts of its monthly invoices showing the attorneys' tasks, time billed, and hourly rate; the invoices disclosed interim monthly payments that had been initially applied against a \$30,000 retainer, and rates charged of up to \$650 per hour.³

The trial court issued an Order to Show Cause re Termination of Receivership and Dismissal of Proceedings and set a hearing on Jeffer's fee request and the Receiver's Final Report and Final Account for June 28, 2008.

RSA moved to surcharge the Receiver \$3,965,072 based upon the Receiver's failure to provide monthly statements and mismanagement of the receivership estate. RSA contended the Receiver had provided only a "sketchy hint" of income and outflow, and inadequately accounted for millions of dollars of income, expenditures and fees. Whereas the Receiver had reported holdings of \$3,567,335 in August 2007, RSA pointed to Southland's schedule summary in its chapter 11 proceedings, which showed \$674,746 of assets and over \$33 million in creditor claims. RSA sought to have the Receiver deposit \$3.2 million with the court.⁴

The Receiver argued that the issue of professional compensation had been raised in open court at least four times but that at no time had the court instructed the Receiver to stop payments to professionals, and that the necessary itemization of fees was set forth in the Receiver's Final Report and in Jeffer's fee request.

At the June 28, 2008 hearing, the Receiver acknowledged his obligation to make monthly reports, but contended that because the Receiver was in court on some matter at

³ Jeffer's hourly rates for one of its attorneys increased to \$650 per hour as of January 1, 2008.

⁴ Two other creditors (El Paseo South Gate LLC and South Gate Plaza LLC) joined RSA's motion; another creditor, University Village LLC, moved to surcharge the Receiver on the same grounds. Michael Keele, the former President and CEO of Southland and a holder of substantial claims against Southland, supported dismissal of the Receivership but questioned the large amount of professional fees the Receiver and other professionals requested.

least every sixty days, the Receiver kept the court apprised of the status of the case; no one complained during the receivership that they did not know what was going on; and the objections filed were nothing more than litigation strategy because they did not contest the results achieved or the services rendered. RSA argued that Jeffer's fee application was unsupported by declarations; was based on duplicative billings and in an incorrect hourly increment; and none of the payments were authorized because the Receiver did not apply for court approval. RSA argued that if the Receiver had provided the monthly reports containing Jeffer's requested fees and costs, the parties could have evaluated whether costs were justified and fees reasonable as the case progressed.

4. *The Trial Court's Memorandum of Decision on Jeffer's Fee Application.*

On November 16, 2008, the trial court issued its Memorandum of Decision, and found that "for the most part," the costs and fees paid to Jeffer were reasonable and the work was of high quality, with exceptions that were subject to a "surcharge." The court made three adjustments to Jeffer's fees.

First, the court found Jeffer's fees incurred after the hearing of January 24, 2008 subject to a 50 percent surcharge. The court reasoned that despite its "reasonably clear expression" that bankruptcy was a better course of action for Southland, the Receiver and Jeffer continued to incur fees and costs unrelated to the preparation and filing of a bankruptcy petition. While recognizing that there were receivership matters that needed counsel's attention, "Given that the order of January 24, 2008, was at least the third time the court expressed the opinion that the Southland matters were more appropriately brought in Bankruptcy Court, the court feels Receiver and his counsel were from this point on primarily pursuing their own agenda rather than this court's expressed desire. Such pursuit should be at their own expense, rather than the creditors of Southland." Further, the court disallowed all fees incurred after the April 23, 2008 bankruptcy filing.

Second, the court found the Receiver and Jeffer had an obligation to make monthly reports of fees and costs incurred. "Not only was their obligation admittedly not performed, no satisfactory explanation is offered as to why it was ignored. Considering

the duration of the proceedings (over 3.5 years as of the June 2008 hearing), the number of times the duty to make monthly reports was ignored (over 24), the number of times the absence of reports was objected to or otherwise raised by some party (at least [four] according to the Receiver), and the expertise of both Receiver and his counsel, the court is compelled to conclude that a conscious decision was repeatedly made to ignore the obligation to file monthly reports.” The court rejected the Receiver and Jeffer’s argument that the current reports and accountings cured the failure to report, and that no prejudice to creditors resulted. “This point, however, ignores the fact that all decisions by the court throughout these proceedings were made based on available information, which information did not, but should have, included the missing financial data as to the fees and costs being incurred by Receiver and his counsel. Similarly, the creditors and other interested parties and their counsel lacked this critical financial information when making their strategic decisions.” The court found it was “extremely difficult, if not impossible, to retroactively assess the reasonableness of the fees and expense in the context of what may have been going on at a particular time. . . . Without having the reports at the time the fees and costs were incurred, highly unreliable and somewhat speculative hindsight is all we have.”

As a result, the court imposed a 15 percent surcharge on the Receiver’s and counsel’s fees: “Having considered other options and percentages, the court feels this surcharge is reasonable for the breach of duty to file monthly reports, and imposes the cost on the entities directly responsible for creating the problem, Receiver and his counsel. The surcharge is not intended as a punishment, but is the court’s attempt to determine the possible fee savings and foregone opportunity costs of not having the reports on a monthly basis, made highly speculative simply because such reports were not filed. [¶] Imposing a 15% surcharge is, admittedly, an imperfect and inexact remedy. However, it is the best this court can reasonably do, considering the sheer volume of the bills now submitted.”

For the third deduction, the court imposed a surcharge on Jeffer’s fees for all fees billed at a rate higher than the \$595 per hour rate set forth in the Order appointing the

Receiver's counsel. "No authority has been presented that Receiver's counsel is entitled to fees above the maximum allowed by the court order appointing Receiver or his counsel, even if the higher rates are in the normal course of business or due to cost of living increases." Because Jeffer's rate went up effective January 1, 2008, the court surcharged time incurred after that date by reducing it to the previously approved rate of \$595 per hour, for a surcharge of \$4,642.

The court approved the Receiver's Final Report and Final Account. The court gave the Receiver and Jeffer the opportunity to elect to have a fee referee appointed, but if they elected not to do so, to prepare and file orders dismissing the receivership, exonerating the Receiver's bond, and discharging the Receiver.

On January 6, 2009, the court entered its Order Imposing Monetary Surcharge against Jeffer, ordering it to pay the receivership estate (1) \$37,265, consisting of a surcharge of 50 percent on the 134.2 hours (at a blended rate of \$555 per hour) Jeffer billed for the period January 24, 2008 to April 23, 2008 for services not directly related to the bankruptcy; (2) \$4,642, consisting of reducing Jeffer's billing rate from \$650 per hour to \$595 per hour for 84.4 hours of time; and (3) \$219,916, consisting of a 15 percent surcharge on Jeffer's fees of \$1,466,106 incurred through April 23, 2008.

Jeffer elected to accept the surcharge against it and declined to seek review of its fees by a referee.

DISCUSSION

Jeffer argues the trial court abused its discretion in surcharging its fees because it improperly penalized Jeffer for a legal duty solely imposed on the Receiver, based the surcharge on speculative and uncertain damage to the receivership, and used an arbitrary approach in calculating Jeffer's reasonable fee. Specifically, Jeffer argues the trial court failed to make a detailed and calculated review of its fee application; failed to consider the lodestar adjustment factors; failed to consider the complexity of the questions and issues presented in this case; and failed to consider the contingent nature of the fee. Jeffer further asserts that the court's reduction based upon possible fee savings was

speculative and uncertain, and that the court and creditors failed to mitigate damages from the failure to file reports.

Compensation of a receiver's attorneys' fee award begins with the "lodestar," which consists of the number of hours reasonably expended multiplied by the reasonable hourly rate. This lodestar figure may then be adjusted upward or downward based upon factors specific to the case to fix the fee at the fair market value of the services provided. (*PCLM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)⁵ The trial court considers a number of factors in making this determination, including the nature and difficulty of the litigation, the amount of fees involved, the skill required to handle the litigation and the skill actually employed, and the success or failure of the litigation. (*Id.* at p. 1096.) "In short, after determining the lodestar amount, the court shall then 'consider whether the total award so calculated under all of the circumstances of the case is more than reasonable amount and, if so, shall reduce [the award] so that it is a reasonable figure.'" (*EnPalm LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774.)

Ultimately, the trial judge has discretion to determine the value of professional services rendered, but because determination of the lodestar figures is fundamental to the calculation of the fee award, exercise of that discretion must be based on that method. (*Serrano v. Priest, supra*, 20 Cal.3d at pp. 48-49.) The experienced trial judge is the best judge of the value of professional services rendered in his or her court, and such determination will not be disturbed unless it is "clearly wrong," i.e., an abuse of discretion. (*PCLM, supra*, 22 Cal.4th at p. 1095.) The party challenging a fee award has the burden of demonstrating error. (*Ketchum v. Moses, supra*, 24 Cal.4th at pp. 1140-1141.)

Although receivers are entitled to compensation for services they and their attorneys perform (*Venza v. Venza* (1951) 101 Cal.App.2d 678, 680), in considering compensation, courts recognize that a receiver is a fiduciary who acts for the benefit of

⁵ The lodestar adjustment method prescribed in *Serrano v. Priest* (1977) 20 Cal.3d 25, applies under a broad range of statutes authorizing attorney fees. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134.)

all parties interested in the property under the receivership, and must account accurately for all monies received from the property. A receiver may be surcharged for the failure to carry out this duty. (*Shannon v. Superior Court* (1990) 217 Cal.App.3d 986, 992.) Further, while no reported decision uses the term “surcharge” to describe a discretionary reduction in attorneys’ fees, and no court has imposed a surcharge on an attorney for a receiver based upon the receiver’s conduct, some courts have used the term “surcharge” to describe excessively high fees awarded in relation to the amount recovered in the litigation. (See, e.g., *Aetna Life & Casualty v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 881-882 [method used to compound attorneys’ fee amounted to a “surcharge” by the plaintiffs’ attorneys upon the elements of the gross award]; *Department of Transportation v. Yuki* (1995) 31 Cal.App.4th 1754, 1768-1769 [attorneys’ fee award amounting to 72 percent of recovery a “surcharge”].)

Here, although the trial court used the term “surcharge,” the reduction in Jeffer’s fees that it made was nothing more than an exercise of its discretion under the lodestar method to determine a reasonable fee. The trial court first started with Jeffer’s submitted fees as the lodestar figure, finding the fees were reasonable and of high quality. From Jeffer’s fees, it deducted 50 percent for fees incurred after January 2008, which were fees incurred subsequent to the court’s repeated but ignored suggestion that bankruptcy was a better course of action than the receivership. It also deducted all fees Jeffers requested for the period subsequent to the bankruptcy filing. The trial court was within its discretion in deducting for these fees that were unreasonable because they were spent on inefficient efforts. (*In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1055; *Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1132.)

Second, the trial court imposed a 15 percent reduction (“surcharge”) on fees based upon Jeffer’s failure to ensure that the Receiver made his monthly reports. An attorney owes a duty to his or her client to advise them of the relevant legal principles in order to facilitate an informed decision based upon an intelligent assessment of the issue. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1092.) Furthermore, the lack of monthly reporting was of serious concern to the trial court because it prevented the parties and

creditors from making informed decisions about the conduct of the case. The court based the 15 percent figure on the possible fee savings which could have resulted from timely receiver's reports. This figure is not arbitrary or beyond the bounds of reason, nor was it speculative or uncertain. (See *EnPalm LLC v. Teitler*, *supra*, 162 Cal.App.4th at p. 773 [court applied equitable principles to reduce attorneys' fee by 90 percent because one of the defendants had intentionally lied under oath, thereby prolonging costly litigation that in the court's view should have been settled early on].) Therefore, the trial court's "surcharge" of the fee award in this case under equitable principles permitting reduction of the lodestar amount was a proper exercise of its discretion.

The trial court's third reduction was for fees charged at an hourly rate higher than the \$595 referenced in the order appointing Jeffer as the Receiver's counsel. This was not an arbitrary or unreasonable reduction, given that fees charged were at a rate higher than that authorized by the court. The trial court has "wide discretion in making reductions based on its estimate of time spent on activities that are noncompensable in whole or in part." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 64.)

Finally, we do not agree with Jeffer's arguments that the trial court failed to make a detailed review of Jeffer's fee application or that it ignored the lodestar adjustment factors and the contingent nature of the case. As our above analysis demonstrates, the court took the lodestar figure and reduced it for inefficient time spent or time that was not compensable based upon the circumstances of the case. In addition, contrary to Jeffer's assertion, neither the court nor the parties were required to mitigate any hardships suffered as a result of the Receiver's failure to comply with the law. Rather, the Receiver, as a fiduciary, had a duty to make his monthly reports. (Cal. Rules of Court, rule 3.1182.)

DISPOSITION

The judgment of the superior court is affirmed. Respondents are to recover their costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.